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SUPREME COURT, U.S.

No. 06-419

In the Supreme Court of the United States

PEDIATRIC SPECIALTY CARE, INC., *et al.*,
Petitioners,

v.

ARKANSAS DEPARTMENT
OF HUMAN SERVICES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' BRIEF IN REPLY

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QUESTION PRESENTED

Whether federal law prohibits a peer review organization from disclosing the identity of doctors and nurses who have denied payment for medical services to a Medicaid-eligible individual on the basis of medical necessity where the individual seeks the identity of the doctors and nurses in connection with an administrative appeal of the decision to deny payment for the services in question.

PARTIES TO THE PROCEEDING

Petitioners

- Pediatric Specialty Care, Inc.
- Child & Youth Pediatric Day Clinics, Inc.
- Family Counseling & Diagnostic Clinic, Inc.
- Tomorrow's Child Learning Center, LLC
- D & D Family Enterprises, Inc.
- James and Stacey Swindle, as parents and next friends of Jacob and Noah Swindle, minors
- Susann Crespino, as parent and next friend of Michael Crespino, a minor

Respondents

- Arkansas Department of Human Services
- Ray Hanley, in his individual capacity
- Roy Jeffus, in his individual capacity and in his official capacity as Director of the Division of Medical Services of the Arkansas Department of Human Services
- Arkansas Foundation for Medical Care, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, petitioners make the following disclosures:

1. Petitioner Pediatric Specialty Care, Inc. ("PSC") is a corporation created under Arkansas law. PSC is wholly-owned by Ascent Acquisition Corporation ("AAC"), which is wholly-owned by Youth & Family Centered Services, Inc. ("YFCS"). No publicly-held corporation owns any part of its stock.

2. Petitioner Child & Youth Pediatric Day Clinics, Inc. ("CYPDC") is a corporation created under Arkansas law. CYPDC is wholly-owned by AAC, which is wholly-owned by YFCS. No publicly-held company owns any part of its stock.

3. Petitioner Family Counseling & Diagnostic Clinic, Inc. ("FCDC") is a Subchapter S corporation created under Arkansas law. FCDC has no parent corporation, and no publicly-held company owns any part of its stock.

4. Petitioner Tomorrow's Child Learning Center, LLC ("TCLC") is a limited liability corporation created under Arkansas law. TCLC has no parent corporation, and no publicly-held company owns any part of its stock.

5. Petitioner D & D Family Enterprises, Inc. ("D & D") is a Subchapter S corporation created under Arkansas law. D & D has no parent corporation, and no publicly-held company owns any part of its stock.

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Appendix A: Excerpts of Deposition of Dr. Michael Moody, taken on September 29, 2004 . . . . . 1c

TABLE OF AUTHORITIES

CASES

Chevron U.S.A. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 3, 4

STATUTES

42 U.S.C. § 1320c-9(d) 3

MISSTATEMENTS OF FACT MADE BY RESPONDENTS

Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, petitioners take this opportunity to address misstatements of fact set forth in the response briefs filed by Arkansas Foundation for Medical Care, Inc. ("AFMC") and Arkansas Department of Health and Human Services ("ADHHS").

I. MISSTATEMENT ONE - DR. MOODY ISSUES ALL DENIALS

Respondents state repeatedly that the Medical Director for AFMC, Dr. Michael Moody, issues all denials. For example, AFMC states on page 2 of its response that "[t]he AFMC medical director makes the final determination, taking the recommendation into account . . . The AFMC medical director signs the decision, and notifies the health care provider making the request of the denial or partial denial." Likewise, ADHHS states on page 1 of its response that "Dr. Moody issues all denials."

These statements are false. Dr. Moody was deposed on September 29, 2004. During his deposition, Dr. Moody testified that he is not sure how many cases he reviews on a quarterly basis. He testified that "[i]t's a very small number. Dr. Moody testified that he has instructed his review staff to refer him any cases that may look questionable. When asked how many questionable cases have been referred to him since AFMC became involved in reviewing CHMS services, Dr. Moody said "[n]one." App. GET. Although his computer-generated signature appears on some denials, Dr. Moody testified that the presence of his signature does not mean that

he has reviewed any of the cases that have been denied. App. GET.

Why is this an important point to make? Throughout this litigation, respondents have argued that if petitioners really need to call an actual decision maker who has personal knowledge of denials made by AFMC, Dr. Moody is their man. As explained above, Dr. Moody is not a decision maker. Dr. Moody is far removed from the decision-making process, and does not have personal knowledge of any denial issued by AFMC. His computer-generated signature means nothing. The truth of the matter is that AFMC is running a smokescreen, and has been using Dr. Moody to run interference for pediatricians who would rather remain silent than justify the decisions they make.

II. MISSTATEMENT TWO - AFMC DOES NOT IDENTIFY PHYSICIANS WHO DENY CHMS SERVICES

Respondents argue that federal law prohibits them from identifying the physicians and nurses who deny Medicaid services to children under the CHMS program. Their actions, however, speak louder than their words. During his deposition, Dr. Moody testified that in most appeals the pediatrician who issued the denial testifies on behalf of AFMC. "Actually, the pediatricians have been doing more of them in the last couple of years than I have." App. GET.

This point is incredibly important to the proper resolution of this case, because it demonstrates beyond cavil that respondents really do not believe that federal law prohibits them from identifying those who deny Medicaid services under the CHMS program. If they did, they would not be calling their physicians at hearings as Dr. Moody admits they

do. Typically, respondents refuse to identify their medical witnesses prior to so-called fair hearings, but call the pediatrician who issued the denial to testify at the very last second. To Dr. Moody's credit, he freely admitted at his deposition that this is the manner in which respondents dispense justice in Arkansas.

Respondents argue that their interpretation of federal law should be given deference under Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). As actions speak louder than words, the Court should give deference to the fact that respondents routinely disclose the identity of their reviewers, albeit during the course of trial.

REASONS FOR GRANTING THE PETITION

Respondents argue that their interpretation of 42 U.S.C. § 1320c-9(d), and the regulations promulgated thereunder, is rational and should be sustained. However, respondents fail to establish that the meaning of § 1320c-9(d) is ambiguous. Under these circumstances, Chevron deference is not appropriate. Chevron, 467 U.S. at 842-43 ("if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

The privilege created by the first sentence of § 1320c-9(d) only applies to "patient records". Because petitioners are not seeking patient records in this case, the privilege created by the first sentence of § 1320c-9(d) does not apply.

The privilege created by the second sentence of § 1320c-9(d) only applies to information gathered for purposes of determining quality of care. Petitioners are not seeking information gathered for the purpose of determining quality of

care; they seek information associated with determinations of medical necessity. While Congress has seen fit to protect information gathered for the purpose of determining quality of care, it has not extended that privilege to decisions based on medical necessity. As the intent of Congress is crystal clear, Chevron deference is not appropriate, and the opinion of the Court of Appeals should be reversed.

Although this case does not create a split among the circuits, it represents an important matter of federal law that has not been settled by this Court. The health and welfare of Medicaid recipients is at stake. This threat of harm is more than theoretical, as petitioners have uncovered massive fraud being perpetrated by respondents against Medicaid-eligible children, fraud that could not take place if the identities of the physicians and nurses employed by respondents were known. Consequently, certiorari should be granted pursuant to Rule 10(c) of the Rules of the United States Supreme Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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